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Nos. 95-509 and 95-520

In the Supreme Court of the United States

OCTOBER TERM, 1995

PACIFICA FOUNDATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ACTION FOR CHILDREN'S TELEVISION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JONATHAN E. NUECHTERLEIN
Counsel
Federal Communications Commission
Washington, D.C. 20554

25pp

QUESTION PRESENTED

Whether the Constitution forbids the government from prohibiting radio and television broadcasters from carrying indecent programming between the hours of 6 a.m. and 10 p.m.

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OPINIONS BELOW

The opinion of the court of appeals in banc (Pet. App.[1] 1a-68a) is reported at 58 F.3d 654. The opinion of the panel (Pet. App. 69a-101a) is reported at 11 F.3d 170. The Federal Communication Commission's

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[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-509.

Report and Order (Pet. App. 102a-133a) is reported at F.C.C.R. 704 (1993).

JURISDICTION

The judgment of the court of appeals in banc was entered on June 30, 1995. Petitions for a writ of certiorari were filed on September 26, 1995, and September 28, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a constitutional challenge to Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 954 (1992), codified at 47 U.S.C. 303 note (Supp. V 1993), which requires the Federal Communications Commission (FCC) to promulgate regulations generally prohibiting the carriage of indecent programming on radio and television broadcast stations between the hours of 6 a.m. and midnight. The statute contains an exception for public radio and television stations that sign off the air at or before midnight, which are allowed to carry indecent programming after 10 p.m.

Since 1927, federal law has prohibited the broadcast of "obscene, indecent or profane language." Radio Act of 1927, Pub. L. No. 69-632, § 29, 44 Stat. 1172-1173, codified as amended at 18 U.S.C. 1464. In *Pacifica Foundation*, 56 F.C.C.2d 94 (1975), the FCC held that the broadcast by a New York radio station of a monologue by comedian George Carlin at 2 p.m. on a weekday was "indecent and prohibited by 18 U.S.C. 1464." 56 F.C.C.2d at 99. As the FCC noted, the language in the monologue "depict[ed] sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium," and the broadcast occurred "at a

time when children were undoubtedly in the audience (*i.e.*, in the early afternoon)." *Ibid.*

This Court upheld the FCC's decision in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). The Court pointed to two factors that supported governmental regulation of indecent broadcasting. First, the Court noted, the broadcast media "have established a uniquely pervasive presence in the lives of all Americans." 438 U.S. at 748. Thus, an indecent broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Second, the Court emphasized, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. As the Court reaffirmed, the "government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household' justifie[s] the regulation of otherwise protected expression." *Ibid.* (citation omitted).

In the years following *Pacifica*, the FCC limited its enforcement of Section 1464 to material that fell within the particular fact pattern at issue in that case —*i.e.*, the repeated use of words virtually identical to those employed in the Carlin monologue. See, *e.g.*, *WGBH*, 69 F.C.C.2d 1250, 1254 (1978). Moreover, language in the FCC's decision in *Pacifica* gave rise to the assumption that such broadcasts would not be actionable if they began after 10 p.m. See 56 F.C.C.2d at 96, 99-100.

In 1987, however, the FCC altered its approach by applying the definition of indecency established in *Pacifica* to find that its rules were violated by the broadcast of programming not within the precise *Pacifica* fact pattern that included "explicit refer-

ences to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles." Pet. App. 6a. *In re Infinity Broadcasting Corp. of Pa.*, 3 F.C.C.R. 930, 932 (1987). The FCC's decisions—as well as its statement that "12:00 midnight" was its current thinking on an appropriate enforcement limit—were reviewed by the court of appeals in *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*). After rejecting vagueness and overbreadth challenges to the FCC's indecency definition, 852 F.2d at 1338-1340, the *ACT I* court found that the FCC had not adequately supported the modification of its indecency safe harbor. In the court's view, principles of administrative law required the FCC to come forward with evidence that the new safe harbor would advance the government's interests in "promoting parental supervision of children's listening," while at the same time avoiding excessive intrusion "upon the licensee's range of discretion or the fare available for mature audiences and even children whose parents do not wish them sheltered from indecent speech." 852 F.2d at 1344. Accordingly, the court remanded the case, emphasizing that under the First Amendment, any safe harbor rule must be "reasonable." 852 F.2d at 1343 n.18.

Following *ACT I*, Congress directed the FCC to promulgate regulations to enforce the existing statutory prohibition of indecent broadcasting "on a 24 hour per day basis." Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988). The FCC did so, and defended its regulations on the basis of an extensive inquiry into the nature and characteristics of the audience for television and radio broadcasting, an inquiry that

generated more than 92,500 formal and informal responses. See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 5 F.C.C.R. 5297, 5310 n.6 (1990) (*1990 Report*) (C.A. App. 54). In *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1509 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) (*ACT II*), the court of appeals struck down the statutory ban on the ground that because in *ACT I* it had stated that the FCC must "identify some reasonable period of time during which indecent material may be broadcast," it had necessarily decided that the FCC "may not ban such broadcasts entirely," even in compliance with a congressional directive.

In response to *ACT II*, Congress passed Section 16(a), which requires the FCC to

> promulgate regulations to prohibit the broadcasting of indecent programming —
>
> (1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
>
> (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

47 U.S.C. 303 note (Supp. IV 1993). Section 16(a) thus generally enacts into law the broadcast indecency safe harbor contemplated by the FCC in its 1987 decisions and reviewed in *ACT I*. In doing so, Congress had before it the extensive record the FCC had generated in the proceeding that led to its *1990 Report*. See 138 Cong. Rec. S7310-S7320 (daily ed. June 2, 1992) (reprinting *1990 Report*); *id.* at S7320-S7322 (reprinting Reply Comments of Salem Communications Corp.). After notice and comment,

the Commission promulgated regulations establishing a broadcast indecency safe harbor in accordance with Section 16(a)'s mandate. Pet. App. 102a-103a, 135a-136a; 47 C.F.R. 73.3999.

Petitioners filed petitions in the court of appeals to review the FCC's implementing rules, contending that the rules and the statute violated the First Amendment. A panel of the appeals court held that the midnight to 6 a.m. safe harbor was unconstitutional. The panel acknowledged that the government has a "compelling interest in restricting the exposure of children to indecent material in the broadcast media," but concluded that the midnight to 6 a.m. safe harbor was not the least restrictive means of advancing that interest. Pet. App. 84a.

The full court vacated the panel's opinion and reheard the case *in banc*. The court first dismissed as "meritless" petitioners' contention that the statute as implemented was unconstitutionally vague, noting that the definition of indecency the FCC would apply in enforcing the safe harbor is identical to the definition that was before this Court in *Pacifica*. Pet. App. 10a. It then concluded (by a 7-4 vote) that Section 16(a)'s midnight to 6 a.m. safe harbor was narrowly tailored to serve compelling government interests, and thus, "standing alone," survived strict First Amendment scrutiny. Pet. App. 25a-26a.

The full court emphasized (as had the panel) that the government has a compelling interest "in supporting parental supervision of what children see and hear on the public airwaves," as well as an "interest in the well-being of minors [that] provides an independent justification for the regulation of broadcast indecency." Pet. App. 13a. The full court also found that the statutory safe harbor was "narrowly drawn"

to advance these interests. The court observed that the broadcast data collected by the FCC revealed that "large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight." Pet. App. 21a. Moreover, the court noted, "adults have alternative means of satisfying their interest in indecent material at other hours in ways that pose no risk to minors." Pet. App. 23a. In the court's view, "deciding where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts is the kind of judgment that is better left to Congress, so long as there is evidence to support the legislative judgment." Pet. App. 25a.

Despite its conclusion that Section 16(a)'s midnight to 6 a.m. safe harbor was constitutionally unobjectionable when examined in isolation, the court found itself unable to uphold the provision's validity in full, because the safe harbor was enacted in conjunction with a preferential 10 p.m. to 6 a.m. safe harbor for certain public radio and television stations. "[T]he preferential safe harbor," the court stated, "has the effect of undermining both the argument for prohibiting the broadcasting of indecent speech before that hour and the constitutional viability of the more restrictive safe harbor that appears to have been Congress's principal objective in enacting section 16(a)." Pet. App. 27a. The court therefore held Section 16(a) unconstitutional "insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." Pet. App. 28a.

ARGUMENT

The decision below is the first by any court to address the constitutionality of Section 16(a) and its implementing regulations. The decision does not conflict with that of any other court and correctly disposes of the issues presented by this case.[2] Further review is therefore not warranted. For reasons explained on pages 18-19, *infra*, however, the Court may wish to hold the present petitions pending its decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227, cert. granted (Nov. 13, 1995).

1. At the outset, we note that although the court of appeals made clear that it believed Congress has the power to restrict indecent broadcast programming to the hours between midnight to 6 a.m., the court actually held Section 16(a) unconstitutional insofar as it prohibits indecent programming between 10 p.m. and midnight. Pet. App. 28a. Because the government has not petitioned for review of that holding, this case presents only the question whether a *10 p.m.* to 6 a.m.

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[2] Like the court below, other federal circuits have jurisdiction to consider the constitutionality of Section 16(a) and its implementing regulations. Any civil action brought by the Department of Justice to collect a forfeiture penalty for the unlawful broadcast of indecent programming would be filed in "the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs." 47 U.S.C. 504(a). That would permit review by the federal circuit with appellate jurisdiction over that district. See also 47 U.S.C. 401(c) (authorizing FCC to request that United States Attorney "institute in the proper court * * * all necessary proceedings for the enforcement of the provisions of this Act").

broadcast indecency safe harbor violates the First Amendment. This case is not the proper vehicle to review the constitutionality of the government's power to impose a midnight to 6 a.m. broadcast indecency safe harbor in some other statute. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted) ("This Court 'reviews judgments, not statements in opinions.'").[3]

2. In any event, a midnight to 6 a.m. safe harbor for indecent broadcasting (and *a fortiori*, the broader safe harbor imposed by the court of appeals) is constitutionally permissible.

a. As a general matter, "[t]he Government may * * * regulate the content of constitutionally protected speech" only "in order to promote a compelling interest" and then only "if it chooses the least restrictive means to further the articulated interest." *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). As this Court has recognized, however, "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 748 (1978); see *FCC* v. *League of Women Voters*, 468 U.S. 364, 377 (1984); *Columbia Broadcasting Sys., Inc.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388-389 (1969).

Governmental regulation of broadcast speech is particularly justified where indecent programming is

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[3] Petitioners Pacifica Foundation, et al., appear to challenge the constitutionality of Section 16(a) only insofar as it imposes a midnight to 6 a.m. safe harbor. See Pacifica Pet. i, 17, 20. Because Pacifica's petition does not take issue with the government's power to impose the broader safe harbor affirmed by the court of appeals, it should be denied.

concerned, for at least two reasons. First, the broadcast media "have established a uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748. Thus, an indecent broadcast "confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.* Second, "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749.

This case does not present the issue of the extent to which government regulation of indecent programming may be subject to a lessened First Amendment standard, however, because the court of appeals properly determined that Section 16(a)'s midnight to 6 a.m. safe harbor for indecent broadcast programming (and *a fortiori*, the 10 p.m. to 6 a.m. safe harbor that resulted from this decision) is "narrowly tailored to serve the Government's compelling interests in the well-being of our youth." Pet. App. 26a.

b. As petitioners implicitly concede (Pacifica Pet. 23; ACT Pet. 26), the government "has a compelling interest in supporting parental supervision of what children see and hear on the public airwaves." Pet. App. 13a. See *Pacifica*, 438 U.S. 726, 749 (1978) ("the government's interest * * * in supporting 'parents' claim to authority in their own household' justifie[s] the regulation of otherwise protected expression"); *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968).

The government also has a compelling interest in "safeguarding the physical and psychological well-being of * * * minor[s]," *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982), an interest that "extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, 492 U.S. at

126. Petitioners disagree, contending that there has been no showing that broadcast indecency is harmful to children. Pacifica Pet. 21; ACT Pet. 15-16.

This Court has never required a scientific showing of what is as much a matter of common sense as a matter of psychological proof, however. *Ginsberg*, 390 U.S. 629, 642 (1968) (upholding prohibition on the sale to minors of sexually explicit material concededly not obscene for adults, even though there had been no demonstration of a "causal link" between such material and harmful effects). In this case, as the court of appeals held, "Congress [did] not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity." Pet. App. 16a-17a.

c. An indecency safe harbor protects the well-being of children and facilitates parental supervision of children's listening and viewing of broadcast programming by channeling such programming to the late hours of the evening, where the opportunity for parents to provide effective control is likely to be greatest, and the number of children in the broadcast audience the least. At the same time, such a safe harbor (whether commencing at midnight or at 10 p.m.) gives adults who wish to receive indecent programming the opportunity to do so at a time when their viewing does not pose an undue risk to children.

Petitioners contend that an indecency safe harbor limited to the late hours of the evening ignores the fact that parents have the opportunity to supervise their children's listening and viewing at other hours of the day. Pacifica Pet. 26; see ACT Pet. 23. But the opportunity to supervise does not necessarily trans-

late into effective control, or eliminate the government's interest in facilitating that control. The parents of a toddler have the "opportunity," for example, to supervise their child's activities and protect the child from harm during many hours of the day. But that opportunity plainly does not justify parents in leaving dangerous implements or poisonous substances within a child's reach on the expectation that they will be able to intervene before the child is hurt. By removing dangerous objects from easily accessible areas—by "child-proofing" their home—parents greatly increase the effectiveness of their supervision of a child's activities. In the same way, an indecency safe harbor channels potentially harmful programming to specific hours of the late evening, thereby allowing parents to concentrate their supervision of their children's television and radio viewing to a manageable portion of the broadcast day.

Common sense suggests that parents have other things to do, even during their hours at home, than constantly to monitor their children's radio and television listening and viewing for indecent programming. Moreover, the rise in the number of televisions and radios used by minors in the average home, see Pet. App. 14a, makes effective monitoring especially difficult. As the FCC has noted, "over 63% of homes have more than one television set, and between 25% and 50% of children have a set for their personal use." Pet. App. 114a. Radio is even more accessible, one study showing that nearly 9 out of every 10 children in 7th through 12th grades have a radio in their bedroom. Pet. App. 117a. In short, it is simply "fanciful," as the court of appeals concluded, "to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so

without meaningful restrictions on the airing of broadcast indecency." Pet. App. 18a.[4]

There is also no basis to conclude that a midnight to 6 a.m. safe harbor (or *a fortiori*, the 10 p.m. to 6 a.m. safe harbor actually upheld by the court of appeals) is unreasonable. The record created by the FCC, and relied upon by Congress in enacting Section 16(a), amply supports the court of appeals' conclusion that "large numbers of children view television or listen to the radio from the early morning until late in the evening, that those numbers decline rapidly as midnight approaches, and that a substantial portion of the adult audience is tuned into television or radio broadcasts after midnight." Pet. App. 21a. For example, while 4.3 million children aged 12-17 are estimated to watch television across the country from 11-11:30 p.m. on week nights, "the number drops to 3.1 million * * * between 11:30 p.m. and 1:00 a.m. and to less than 1 million * * * between 1:45 and 2:00 a.m." Pet. App. 21a. See Pet. App. 116a-117a; accord 138 Cong. Rec. S7321 (daily ed. June 2, 1992). Statistics with regard to radio listeners similarly show that large numbers

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[4] Petitioners Pacifica Foundation, et al., contend that an indecency safe harbor impermissibly infringes upon the rights of those parents who wish to *expose* their children to indecent speech. Pacifica Pet. 27-28. Putting aside the weight to be given to such an interest, parents who wish to expose their children to indecent video or audio programming "will have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes." Pet. App. 18a. By contrast, as the court of appeals recognized, parents who wish to protect their children from the same kinds of speech are unable to do so effectively absent government intervention.

of minors remain in the audience even after midnight. Pet. App. 22a; Pet. App. 117a-120a.[5]

Concomitantly, even a midnight to 6 a.m. safe harbor gives adults a "meaningful opportunity" to receive indecent television and radio programming. See Pacifica Pet. 16, 24. As the court of appeals observed, significant numbers of adults watch television and listen to radio after midnight. See Pet. App. 23a (noting that 15 percent of adults in Chicago, and 18 percent in Washington, D.C., watch broadcast television at midnight); *ibid.* (noting that 6 percent of adults listen to radio between 10:00 and 11:00 p.m., and 4 percent between midnight and 1:00 a.m.). Other adults who wish to obtain access to indecent broadcasts need simply stay up later in order to do so. Alternatively, adults remain free to use an audio or video tape recorder to preserve a broadcast for viewing or listening at a more convenient time. The safe harbor thus does not foreclose adults from receiving indecent programming—at most, it restricts the ability of

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[5] Petitioners complain that these statistics are misleading because they do not differentiate among stations or programs, and that such station or program-specific information might support a more narrowly tailored safe harbor. ACT Pet. at 16-18; Pacifica Pet. 29 n.16. As the court of appeals noted, it is unreasonable to presume that children will accurately record their viewing of indecent programming in audience surveys. Pet. App. 22a. More fundamentally, nothing prevents minors who are watching television or listening to radio from changing the channel or turning the dial; indeed, the practice of viewer "grazing" across the television or radio dial is undisputed. Thus, the fact that a particular station or program has not had a large number of children in its listening or viewing audience in the past provides no certain indication that its broadcast of indecent programming will not attract such an audience in the future. See Pet. App. 22a-23a.

some adults to see and hear such programming at the time of its original broadcast. In addition, although not in itself determinative, see ACT Pet. 24-25, it is plainly relevant that adults may obtain access to the same sorts of indecent speech in other ways, such as by "purchasing tapes and records" containing the same words and images. See *Pacifica*, 438 U.S. at 750 n.28; Pet. App. 24a. In all these circumstances, it is "entirely appropriate," as the court of appeals concluded, "that the marginal convenience of some adults be made to yield to the imperative needs of the young." Pet. App. 25a.[6]

Given the court of appeals' determination that there was a reasonable risk of a substantial number of children in the broadcast audience during the late evening hours, and its conclusion that a midnight to 6 a.m. safe harbor provided a meaningful opportunity for

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[6] Petitioners Pacifica Foundation, et al., also contend that the safe harbor fails to take into account "the First Amendment interests of maturing minors." Pacifica Pet. 25. That a seventeen year old is presumably more mature than a seven year old, however, does not preclude Congress from relying on data regarding teenage listeners and viewers in constructing an appropriate safe harbor for indecent broadcasting. The age of 18 has been found relevant in the federal dial-a-porn and child pornography statutes, see 47 U.S.C. 223(b); 18 U.S.C. 2256, as well as in similar laws of 48 States. See *In re Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 4 F.C.C.R. 8358, 8368-8372 (1989). Moreover, this Court has recognized the government's compelling interest in restricting the availability of indecent material to "minors" generally, without drawing a distinction between teens and preteens. See, *e.g.*, *Sable*, 492 U.S. at 126; *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 684-685 (1986); *Ginsberg*, 390 U.S. at 640-641. Finally, maturing teens, like adults, tend to have greater opportunities than younger children to stay up late and avail themselves of the statutory safe harbor.

adult access to such programming, it was entirely proper for the court to leave to Congress the judgment of "where along the bell curves of declining adult and child audiences it is most reasonable to permit indecent broadcasts." Pet. App. 25a. As the court recognized, "determining the parameters of a safe harbor involves a balancing of irreconcilable interests." Pet. App. 24a. The larger the safe harbor, the more the convenience of adult listeners and viewers to view indecent programming is served. By contrast, the smaller the safe harbor, the more the government's interests in protecting children and promoting parental supervision are advanced. The decision about how best to balance these competing interests, within constitutional limits, is a matter for legislative judgment, not for adjudication.

Thus, in *Buckley* v. *Valeo*, 424 U.S. 1, 30 (1976), this Court rejected a challenge to the contribution limits of the Federal Election Campaign Act, stating that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." Similarly, in *Burson* v. *Freeman*, 504 U.S. 191 (1992), the Court upheld Tennessee's ban on political solicitations within 100 feet of a polling place against arguments that the prohibited zone "could be somewhat tighter," concluding that the issue is not one of "constitutional dimension." 504 U.S. at 210 (plurality opinion); see also *id.* at 216 (Scalia, J., concurring in the judgment).

3. Finally, this Court's decisions in *Pacifica* and *Sable* effectively foreclose the claim by petitioners Action for Children's Television (ACT Pet. at 26-28) that the FCC's definition of broadcast indecency is unconstitutionally vague. The FCC's definition is

virtually identical to the definition this Court had before it in *Pacifica*. Compare Pet. App. 104a n.10 with 438 U.S. at 732. The definition was challenged as unconstitutionally vague in *Pacifica*, see 77-528 Brief for Amici Curiae American Broadcasting Cos., Inc., et al., at 33-39, but this Court upheld the FCC's power to regulate the broadcast of the Carlin monologue without expressing any vagueness concerns regarding the Commission's definition and, indeed, after quoting portions of that definition with apparent approval. See 438 U.S. at 739, 741. It thereby implicitly rejected any vagueness challenge. *ACT I*, 852 F.2d at 1339.

A similar vagueness claim against the FCC's indecency definition was also asserted in *Sable*. See 88-515 & 88-525 Br. for Appellant/Cross-Appellee Sable Communications of Calif., Inc., at 32-37. Although this Court overturned a congressional ban on indecent prerecorded telephone messages on other grounds, it did so without expressing any concerns that the FCC's generic definition of indecency would preclude more narrowly tailored efforts to regulate such messages. See 492 U.S. at 128. The *Sable* decision thus also strongly suggests that "the term 'indecent' as interpreted by the Commission is not per se void for vagueness." *Information Providers' Coalition for Defense of the First Amendment* v. *FCC*, 928 F.2d 866, 874 (9th Cir. 1991). Accord *Dial Information Servs.* Corp. v. *Thornburgh*, 938 F.2d 1535, 1541 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992).

Petitioners assert that there is a conflict between these decisions and *Jones* v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), aff'd mem., 480 U.S. 926 (1987), which affirmed a district court's decision that a Utah

statute regulating indecent programming on cable television was preempted by federal law and was in any event unconstitutionally vague.

Jones is plainly distinguishable. In the first place, the Utah statute at issue in the case had its own definition of indecency, which differed from that of the FCC. See 800 F.2d at 990 n.1. The statute also applied to cable, not broadcast television. As this Court has recognized, see *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2456-2458 (1994), there are important differences between the two media. Finally, *Jones* was decided before this Court's decision in *Sable*, and the appeals courts' decisions in *ACT I*, *Information Providers* and *Dial Information*. There is no reason to assume that the Tenth Circuit would address the vagueness issue in the same way without taking account of the analysis contained in those decisions.

4. On November 13, 1995, this Court granted certiorari in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227. Those cases present a challenge to the constitutionality of Section 10 of the Public Telecommunications Act of 1992, 106 Stat. 951. That provision regulates indecent programming transmitted over leased access and public access cable television channels. It permits cable operators to ban such programming and requires operators who do not do so to "scramble" such programming and make it available only to subscribers who request it. The definition of "indecent programming" in Section 10 is essentially identical to the definition in Section 16. Compare 95-124 Pet. App. 172a (definition of "indecent programming" for purposes of Section 10) with 95-520

Pet. App. 3a ("indecent programming" for purposes of Section 16).

This Court's decision in *Denver Area* and *Alliance for Community Media* could affect the analysis and disposition of this case in two respects. First, one of the issues presented in those cases is whether the FCC's definition of "indecent programming" is unconstitutionally vague. See 95-124 Pet. i. Petitioner ACT in this case appears to raise a similar issue. See 95-520 Pet. 26-29. If the Court reaches that issue in the *Denver Area* and *Alliance for Community Media* cases, its analysis and disposition could affect the proper disposition of the similar issue in this case. Second, the interests advanced to support the constitutionality of the cable regulations in *Denver Area* and *Alliance for Community Media* are similar to the interests advanced to support the constitutionality of the broadcast television regulations in this case. For that reason as well, it is possible that the Court's resolution of the issues in *Denver Area* and *Alliance for Community Media* could affect the proper disposition of this case. Accordingly, the Court should hold these petitions pending its disposition of *Denver Area* and *Alliance for Community Media* and then dispose of these petitions accordingly.

CONCLUSION

The petitions for a writ of certiorari should be held pending this Court's decision in *Denver Area Educational Telecommunications Consortium* v. *FCC*, No. 95-124, and *Alliance for Community Media* v. *FCC*, No. 95-227, and then disposed of accordingly.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

BARBARA L. HERWIG
JACOB M. LEWIS
Attorneys

WILLIAM E. KENNARD
General Counsel

CHRISTOPHER J. WRIGHT
Deputy General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JONATHAN E. NUECHTERLEIN
Counsel
Federal Communications Commission

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